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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-949

Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS
CLERK

STATE OF CALIFORNIA,

Petitioner,

v.

LAWRENCE RICHARD GARCIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of California

RESPONDENT'S BRIEF IN OPPOSITION and MOTION TO PROCEED IN FORMA PAUPERIS

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RESPONDENT'S BRIEF IN OPPOSITION

There are at least three reasons why certiorari should be denied in this case. First, and probably most critical, this case is fundamentally concerned with a state law definition of the constituent elements of capital murder. It is up to the states to define those crimes and those criminals for which capital punishment may be appropriate. (Gregg v. Georgia (1976) 428 U.S. 153, 186; Zant v. Stephens (1983) ___ U.S. ___ [77 L.Ed.2d 235, 250-251, fns. 15 and 17]; cf. Patterson v. New York (1977) 432 U.S. 197, 201, 202.)

California has, consistent with its own authority, defined the statutory elements of a "special circumstance" (capital) first degree murder (see Cal. Pen. Code, § 190.2, subd. (a)(17)) so as to include an intent-to-kill requirement before a defendant can be subjected to the alternative punishments of death or life without possibility of parole. (Carlos v. Superior Court (1983) 35 Cal.3d 131, 151-154 [___ Cal.Rptr. ___, ___ P.2d ___].)[1/]

Thus, while the felony-murder rule remains a viable theory of first degree murder under existing California law (Cal. Pen. Code, §§ 187, 189; People v. Dillon (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697]), California requires proof of an additional element, i.e., intent-to-kill, before that felony-murder becomes a capital murder. (Carlos v. Superior Court, supra, 35 Cal.3d 131, 153-154.)

In the instant case, the California Supreme Court specifically rejected petitioner's attempts at distinguishing "special circumstances" from elements of an offense for purposes of avoiding the Due Process implications of the Fourteenth Amendment. Citing to and discussing its own previous interpretation of California's special circumstance scheme, the Court found that California law treats the elements of a special circumstance as though they were elements of a criminal offense (i.e., they can be challenged pretrial under California Penal Code, section 995,[2/] they are held to

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1. Non-capital murder of the first degree is punishable in California by imprisonment for an indeterminate term of 25 years to life. (Cal. Pen. Code, §§ 190-190.1.)

2. California Penal Code section 995 provides in relevant part as follows:

> "(a) Subject to subdivision (b) of section 995a, the indictment or information shall be set aside by the court in which the defendant is

the same standards of specificity applicable to statutes defining criminal offenses, and they require a finding of proof beyond a reasonable doubt by a unanimous jury. (People v. Garcia (1984) 36 Cal.3d 539, 551-552 [___ Cal.Rptr. ___, ___ P.2d ___].)[3/] They are also subject to principles of double jeopardy. (People v. Green (1980) 27 Cal.3d 1, 62 [164 Cal.Rptr. 1, 609 P.2d 468].)

Indeed, two years earlier in People v. Superior Court (Engert), supra, the court stated:

> "We must reject the People's argument that when the jury is determining the truth of the charged special circumstances, it is exercising a sentencing function and that, therefore, the requirements of due process for narrowness and clarity are lessened. (See People v. Thomas (1979) 87 Cal.App.3d 1014, 1022-1024 [151 Cal.Rptr. 483].) Proceedings do not move into the penalty, or sentencing, phase until after a defendant is convicted of first degree murder and the special circumstance is found to be true. (Pen. Code, §§ 190.1, 190.2.) In the California scheme the special circumstance is not just an aggravating factor: it is a face or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole.[] The fact or set of facts to be found in regard to the special circumstance

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fn. cont.

> arraigned, upon his or her motion, in either of the following cases:
>
> "(1) If it is an indictment:
>
> "(B) That the defendant has been indicted without reasonable or probable cause.
>
> "(2) If it is an information:
>
> "(B) That the defendant had been committed without reasonable or probable cause."

3. See Ramos v. Superior Court (1982) 32 Cal.3d 26, 32-33 [184 Cal.Rptr. 622, 648 P.2d 589], and People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803 [183 Cal.Rptr. 800, 647 P.2d 76].

is no less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which, when found by a jury, define the crime rather than a lesser included offense or component. Thus, there is no reason why due process should not require the same specificity in defining the special circumstance that it requires in the definition of the crime itself." (31 Cal.3d at p. 803; original and added emphasis; fn. omitted.)

This Court's decision in Mullaney v. Wilbur (1975) 421 U.S. 684, which petitioner seeks to distinguish (see Pet. for Cert., pp. 18-21), lends further support to respondent's contention. Just as Mullaney held that due process applies to every element necessary to convict a defendant of the "degree" of a crime found by the jury (421 U.S. at pp. 698-701; emphasis added), so too should the Fourteenth Amendment apply to every element of a California special circumstance. "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." (421 U.S. at p. 698.)

In California, juries must first determine a defendant's guilt of first degree murder before proceeding to the factual determination of the truth of the special circumstance allegation. (Cal. Pen. Code, §§ 190-190.1.) The special circumstance, if found true, operates to elevate the degree of a defendant's criminal liability in terms of potential punishments (25 years to life versus death or life without possibility of parole.)[4/]

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4. The actual punishment to be imposed on a defendant whose jury first determined both guilt and the special circumstance allegation is reserved to a separate penalty trial in which additional evidence pertaining to aggravating and mitigating circumstances is presented. (Cal. Pen. Code, § 190.3.)

The California Supreme Court's decision in Carlos, supra, confirmed a substantive definition of a criminal offense duly promulgated by state enactment. (People v. Garcia, supra, 36 Cal.3d at p. 549.) Garcia merely applied that definition to ensure that defendants who do not intend-to-kill are not subjected to the potential alternative punishment of death or life imprisonment without possibility of parole under California's special circumstance statutory scheme.

The second reason why certiorari should be denied is really an extension of the first. Petitioner readily acknowledges that the reasoning of this Court's plurality opinion In Connecticut v. Johnson (1983) ___ U.S. ___ [74 L.Ed.2d 823] may very well require the application of a per se standard of prejudicial error to cases which involve the total withdrawal of an element of the charged offense from the jury's consideration. (Pet. for Cert., pp. 26-27.) Yet without further discussion or analysis, petitioner concludes that since special circumstanes are "sui generis" the determination of their validity beyond a reasonable doubt by a unanimous jury "seems less fundamental and would allow for a harmless error test under the Chapman standard." (Ibid.; emphasis added.)

We have already shown that California treats the special circumstances defined in California Penal Code, section 190.2, subdivision (a)(17) as though they are elements of an offense for all practical due process purposes. (See Ramos v. Superior Court, supra, 32 Cal.3d at pp. 32-33; People v. Superior Court (Engert), supra, 31 Cal.3d at p. 803; People v. Green, supra, 27 Cal.3d at p. 62; see also Ghent v. Superior Court (1979) 90 Cal.App.3d 944, 952-955,

and fns. 9-10 [153 Cal.Rptr. 720].) The trial on and the determination of the special circumstance allegations are not only conducted at the same time as are the issues of guilt and innocence (Cal. Pen. Code, § 190.1), under California law they have all "the hallmarks of the trial on guilt or innocence." (Bullington v. Missouri (1981) 451 U.S. 430, 439-441, 444-446; emphasis added.)

Thus, the foundation of petitioner's challenge to the application of "fundamental" due process principles to a special circumstance determination, including his dispute with a per se rule of prejudicial error, is fatally flawed.

Third, the type of per se rule adopted by the California Supreme Court is totally consistent with this Court's own precedent. Garcia simply holds that where an element of the special circumstance allegation is totally withdrawn from the jury's determination by failing to deliver any instructions thereon and where an appellate court cannot determine, from the verdict forms returned in light of the instructions actually given, that the jury necessarily resolved that critical element against the accused, then a finding by that jury on that special circumstance allegation is per se unreliable. (People v. Garcia, supra, 36 Cal.3d 539, 556.)[5/] And even this portion

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5. See Connecticut v. Johnson, supra, 74 L.Ed.2d 823, 835 (see also dissent opn. of Mr. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor at pp. 840 and 841, fn. 3); Sandstrom v. Montana (1979) 422 U.S. 510, 520; Presnell v. Georgia (1979) 438 U.S. 14, 16; In re Winship (1970) 397 U.S. 358, 364; Duncan v. Louisiana (1967) 391 U.S. 145, 149-150; Speiser v. Randell (1958) 357 U.S. 513, 526; Carpenters and Joiners of America v. United States (1946) 330 U.S. 395, 408; Bollenbach v. United States (1946) 326 U.S. 607, 613-615.

of the Garcia decision is predicated in substantial part on California law.[6/]

In Connecticut v. Johnson, supra, a four-member plurality of this Court held that a presumption which permits a jury to convict without ever examining the evidence concerning an element of the offense charged deprives the defendant of "'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error'" (74 L.Ed.2d at p. 835; emphasis added.) If the jury may have failed to consider evidence of intent, "a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." (Id., at pp. 833-834; emphasis added.)

Four dissenting justices took issue with the plurality's conclusion that Johnson was necessarily denied a jury determination on the issue of intent so as to entitle him to automatic reversal. (Id., at p. 840; opn. of Mr. Justice Powell.) Rather, the dissent viewed the Sandstrom-type presumption instruction as not operating independently of the evidence: "The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption." (Ibid.; emphasis added.) The dissenters opined that "it was necessary for the jury to look to the facts and circumstances to determine what [Johnson] did -- i.e. to consider the character and quality of his acts -- before it could define the natural and necessary consequences

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6. See Garcia's discussion of People v. Cantrell (1973) 8 Cal.3d 672, People v. Thornton (1974) 11 Cal.3d 738 and People v. Sedeno (1974) 10 Cal.3d 703 at 36 Cal.3d at p. 554.

of those acts. If, however, the basic facts are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from the jury's consideration, it does not preclude a reviewing court from determining whether the error was 'harmless beyond a reasonable doubt.' (Citations)." (Id., at pp. 840-841; emphasis added.)

The dissenters made clear, however, that had Johnson involved a situation which "remove[d] the issue of intent from the jury's consideration", thereby permitting the "'jury to convict without ever examining the evidence concerning an element of the crimes charged,'" (74 L.Ed.2d at p. 840 and fn. 3, 841), a reviewing court would have been precluded from applying a Chapman test of prejudice, and automatic reversal would have been required. (Ibid.; see also Jackson v. Virginia (1979) 443 U.S. 307, 320, fn. 14; and Bollenbach v. United States, supra, 326 U.S. 607, 610-615.)

Thus, both the plurality and dissenting opinions in Johnson agree that a conviction is fundamentally flawed when obtained through a process which instructs the fact-finder to return a guilty verdict without examining the evidence concerning a necessary element of the charge.

The instructional error at issue in the case at bench, where felony murder specials have been found true without a corresponding finding of intent to kill, is more acute than the errors addressed in Sandstrom, supra, and Connecticut, supra. Appellant's jury was never even told that intent-to-kill was a necessary element of the special allegation. They were simply instructed that if the

defendant participated in one of the listed felonies and someone was killed during its commission,[7] the special circumstance allegation was established as a matter of law; the defendant's intent-to-kill was totally irrelevant. Thus, respondent was convicted "of a charge on which [he was] never tried." (Presnell v. Georgia, supra, 439 U.S. 14, 16.)

* * * * * *

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7. See California Penal Code section 190.2, subdivision (a)(17)(i-viii).

CONCLUSION

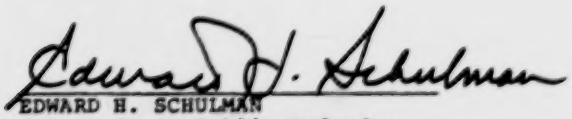
In short, this case does not present the Fourteenth Amendment issues "in a manner which warrants the exercise of the certiorari jurisdiction of this Court." (Murel v. Baltimore City Criminal Court (1972) 407 U.S. 355, 357.)

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Dated this 3rd day of January 1985, at Los Angeles, California.

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender



EDWARD H. SCHULMAN
Deputy State Public Defender

Attorneys for Respondent

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No. 84-949

STATE OF CALIFORNIA,

Petitioner,

v.

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Respondent.

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MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, LAWRENCE RICHARD GARCIA, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to rule 46. Respondent has at all times during the pendancy of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency.

Counsel has not yet received an affidavit from respondent, who is presently incarcerated and awaiting

retrial in Ventura, California. Mr. Garcia's affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender

Edward H. Schulman

EDWARD H. SCHULMAN
Deputy State Public Defender

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-949

STATE OF CALIFORNIA,	:	
Petitioner,	:	
v.	:	AFFIDAVIT
LAWRENCE RICHARD GARCIA,	:	
Respondent.	:	

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) s.s.:

EDWARD H. SCHULMAN, being duly sworn, states:

1. I am a Deputy State Public Defender and counsel to LAWRENCE RICHARD GARCIA in California v. Garcia, now pending in the Court on petition for writ of certiorari. I make this affidavit in support of Mr. Garcia's motion for leave to proceed in forma pauperis.

2. Mr. Garcia is presently in the custody of the State of California and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Garcia by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. garcia is attached hereto.

3. Counsel was appointed to represent Mr. Garcia at trial, on appeal, and on these post-appeal proceedings.

//

//

4. I am informed and believe that because of his poverty, Mr. Garcia is unable to pay the costs of this cause or to give security for same.

EDWARD H. SCHULMAN
Deputy State Public Defender

Attorneys for Respondent

Sworn to before me this
3rd day of January 1985.

NOTARY PUBLIC

My commission expires:

OFFICIAL SEAL
ADRIAN K. PANTON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Oct. 30, 1987

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-949

STATE OF CALIFORNIA,	
Petitioner,	
-against-	
LAWRENCE RICHARD GARCIA,	
Respondent.	

I, LAWRENCE RICHARD GARCIA, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated, and have been for the past five years; I receive no income from earnings, and have no cash or checking or savings account.

3. I am unable to give security for said cause.

4. Counsel was appointed to represent me at trial, on my direct appeal, and on these post-appeal proceedings.

_____
LAWRENCE RICHARD GARCIA

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

The foregoing affidavit of LAWRENCE RICHARD GARCIA was subscribed and sworn to before me this ___ day of _____.

_____
NOTARY PUBLIC

My commission exprires:

IN THE

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October Term, 1984

No. 84-949

STATE OF CALIFORNIA,	:
Petitioner,	:
v.	:
LAWRENCE RICHARD GARCIA,	:
Respondent.	:

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis, by depositing said brief in the United States Mail, postage prepaid and properly addressed to John K. Van de Kamp, Attorney General, John W. Carney, Deputy Attorney General, suite 700, 110 West "A" Street, San Diego, California 92101, and Clerk, California Supreme Court, 4250 State Building, 455 Golden Gate Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 3rd day of January 1985, at Los Angeles, California.

Edward H. Schulman

EDWARD H. SCHULMAN
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107 South Broadway, Suite 9111
Los Angeles, California 90012